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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LINDA HONG,

Plaintiff and Respondent,

v.

WON BEOM LEE et al.,

Defendants and Appellants.

G054880

(Super. Ct. No. 30-2014-00745940)

O P I N I O N

Appeal from judgments of the Superior Court of Orange County, Frederick Paul Horn, Judge. Reversed.

Law Office of Tom S. Chun, and Tom S. Chun for Defendants and Appellants.

Daniel E. Park Law Corporation, Daniel E. Park, Christopher C. Cianci; Morgenthaler Law Group, and Alisa M. Morgenthaler for Plaintiff and Respondent.

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Howard Kea was the husband of plaintiff Linda Hong (Hong), the brother-in-law of defendant Won Beom Lee (Lee), and the uncle of defendant Eun Joo Lee (Eun Joo). After Howard died in 2010, disputes arose over his holdings, including a health spa business in Garden Grove, California. The parties filed various lawsuits. The instant matter is an appeal from the judgments in Hong's favor on her complaint against Lee, Eun Joo, and defendant Beom & Eun Investments, LLC (BEI), an entity allegedly formed by Lee and Eun Joo to own and operate the health spa (collectively "defendants").

After denying multiple dispositive motions, including a demurrer, motion for summary judgment and motion for nonsuit, the trial court ruled in Hong's favor on her equitable claims for declaratory relief and constructive trust. A jury later ruled in her favor on her legal claims for breach of fiduciary duty and conversion. The trial court entered separate judgments on the equitable and legal claims. Defendants appealed from the judgments, arguing the trial court erred in denying their various dispositive motions. For the reasons stated below, we reverse the judgments.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prior Actions*

On March 22, 2011, Hong filed a complaint against Lee, Eun Joo and Joung Hee Kea (Lee's wife, Eun Joo's mother, and Hong's sister-in-law), alleging causes of action for breach of fiduciary duty, fraud, breach of contract, unjust enrichment, conversion and declaratory relief arising out of the alleged conversion of Hong's 50 percent interest in the spa in 2010, in violation of a 2004 joint venture agreement. Hong eventually dismissed this action without prejudice.

In December 2011, Lee, Joung Hee, and Howard's other siblings, Moo Young Kea and James Kea, sued Hong. They alleged she was responsible for several substantial loans they had made to Howard to finance his businesses, including the spa. The trial court granted Hong's motion for nonsuit on the loan-based claims, and this court

affirmed on the ground that those claims were time-barred. (See *Kea v. Hong* (Dec. 29, 2015, G050853) [nonpub. opn.].)

In that same action, Hong filed a cross-complaint alleging causes of action for breach of written contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty and constructive fraud against Lee, and causes of action for conversion and conspiracy against Lee, Eun Joo and the other plaintiffs. The cross-complaint sought declaratory relief and constructive trust. Hong's claims arose from the plaintiffs' alleged 2010 conversion of Hong's 50 percent interest in the spa, in violation of a 2004 joint venture agreement. The cross-complaint proceeded to trial. After Hong presented her evidence, the trial court granted the plaintiffs' motion for nonsuit on all claims for failure to prove damages. This court affirmed the nonsuit on all claims, except the equitable claims for declaratory relief and constructive trust. (See *Hong v. Lee* (Dec. 29, 2015, G050737) [nonpub. opn.]¹)

B. *Instant Action*

1. Complaint

On September 18, 2014, Hong filed the instant complaint against defendants. The complaint alleged that Hong is a member of BEI, and that defendants (1) deprived her of her right to inspect BEI's books; (2) failed to provide an accounting of BEI's profits and expenses; (3) converted her interest in BEI by refusing to release or pay her "any and all amounts due and owing to [Hong] in accordance with her interest in BEI." Based on the same allegations, Hong also pleaded causes of action for declaratory relief, unjust enrichment, and constructive trust. In the declaratory relief claim, Hong sought a judicial determination "(1) that the value of her interest in BEI [is] 50 [percent] and (2) the amount of any income, profits and other monetary and beneficial distributions made to managers, members and holders of an interest in BEI since it began operating

¹ Further proceedings on the equitable claims have been stayed pending this appeal.

Imperial [health spa] should have been made to [Hong] in accordance with her 50 [percent] interest in BEI and the amount of all such distributions which should have been made to her.” In the constructive trust claim, Hong sought the imposition of a constructive trust based on defendants’ refusal “to release to [Hong] any and all amounts due and owing to [her] in accordance with her interest in BEI,” and their holding of “the property of [Hong] wrongfully taken and/or withheld, despite having no legal or equitable rights, claims or interest therein.”

Hong also brought shareholder derivative claims for breach of fiduciary duty, conversion, declaratory relief and constructive trust. In the derivative cause of action for breach of fiduciary duty, Hong alleged that Lee and Eun Joo breached their fiduciary duties to BEI by “looting BEI of its funds, engaging in other self-dealing, failing to pay amounts due and owing to other members and holders of interest in BEI, including [Hong], and failing to maintain company records and/or provide them for inspection to members and holders of interest in BEI, including [Hong].”

2. Demurrer

Defendants demurred to the complaint on the ground that the action was barred under the doctrine of res judicata because it was Hong’s third attempt to litigate the alleged loss of her 50 percent interest in the spa. Defendants also argued that Hong lacked standing to bring any derivative claims because she was not a shareholder of record or beneficial owner of BEI. Hong opposed the demurrer on the ground that “Hong’s rights as a member of BEI and the harm suffered by that entity [were] not the subject of the two prior lawsuits.” The trial court overruled the demurrer, concluding that (1) the doctrine of res judicata did not apply because the prior actions were currently being appealed and not final, and (2) Hong had standing to bring derivative claims because she alleged she held an ownership interest in BEI.

3. Answer

Following the overruling of their demurrer, defendants filed an answer denying “generally and specifically each and every allegation of the Complaint and each and every cause of action contained therein.” The answer also raised numerous affirmative defenses, including that the applicable statute of limitations and the doctrines of res judicata and collateral estoppel barred the action.

4. Motion for Summary Judgment

In August 2015, defendants filed a motion for summary judgment, arguing the undisputed evidence established that Hong could not show she had any interest in BEI. Defendants argued that Hong predicated all of her claims, whether direct or derivative, on the allegation that Hong is a member or owner of BEI. Under Corporations Code section 17704.01, subdivision (c), unless otherwise provided for in the limited liability company’s (LLC’s) operating agreement, no one can become a member of an LLC without consent of all its members. Defendants noted that neither Lee nor Eun Joo granted or issued membership in BEI to Hong. Additionally, Hong herself stipulated her purported interest in BEI stemmed solely from her claim she was a co-owner of the spa.

The trial court denied defendants’ summary judgment motion in a minute order. It concluded that defendants failed to present authority to support their assertion that membership in BEI is a necessary element of each and every cause of action in the complaint. In the same minute order, the court denied Hong’s motion for summary adjudication on several causes of action, including that Hong failed to present any legal authority to support her claim that her ownership of the spa would give her membership or an interest in BEI.

5. Other Pretrial Motions

Defendants filed a pretrial motion for judgment on the pleadings.

Defendants argued that Hong based her claims on her alleged membership or interest in BEI, which she could not establish. Defendants also noted this court had affirmed the nonsuit of Hong's claims, except the two causes of action for declaratory relief and constructive trust. The trial court denied defendant's motion for judgment on the pleadings. It concluded that Hong's ownership interest in BEI, if any, had not been adjudicated in the earlier lawsuits.

Defendants filed a motion in limine to preclude Hong from presenting any evidence of her ownership interest in the spa. Defendants argued the parties had previously litigated her claim of ownership in the prior action. The trial court denied the motion.

6. Trial

At trial, Hong pursued only four claims: equitable claims for (1) declaratory relief and (2) constructive trust; and legal claims for (3) breach of fiduciary duty against Lee and (4) conversion against Lee, Eun Joo, and BEI. The parties stipulated that Hong had a 50 percent interest in the spa which operated from 2004 to 2010, before a new spa business began operating at the same location.

Following Hong's opening statement, defendants moved for nonsuit, arguing that Hong based her claims on her membership in BEI. Defendants argued the claims being presented were materially different from the claims alleged in the complaint. Additionally, they argued that the alleged wrongful taking of Hong's 50 percent interest in the spa in 2010 occurred before BEI's formation, and thus was not relevant to any cause of action, or barred by the doctrine of res judicata. In response, Hong's counsel asserted the trial was about BEI's conversion of Hong's 50 percent interest in the spa. Counsel argued res judicata was inapplicable because BEI was never a party to the prior action, and the conversion cause of action and the equitable claims did

not depend on Hong's status as a BEI member. The motion for nonsuit was taken under submission.

After Hong rested, defense counsel renewed the nonsuit motion in writing. In opposition, Hong's counsel raised the additional argument that the breach of fiduciary claim against Lee was based on his being a "business partner" with Hong. The trial court continued the nonsuit motion until both sides rested, and then denied the motion.

7. Judgments on Equitable and Legal Claims

The trial court subsequently ruled on the equitable claims in favor of Hong and granted the requested relief. In its statement of decision, the court found that Hong and her husband built the spa in 2002, Hong and Lee became 50-50 owners in March 2004, Eun Joo signed a new lease for the spa in July 2010 and excluded Hong from the lease and any other participation in the spa. The court also found Lee and Eun Joo formed BEI in April 2011 and assigned the spa's lease to BEI on April 4, 2011, and BEI operated the spa from April 14, 2011 to the present. Based on these factual findings, the court determined that Hong had a 50 percent ownership interest in the spa, BEI wrongfully took and continued to hold that 50 percent interest, and "by virtue of BEI's wrongful holding of [Hong's] interest, and by virtue of the fact that BEI's only asset is the spa, [Hong] has a 50 [percent] interest in BEI." Based on the same findings, the court granted the request for imposition of a constructive trust.

Thereafter, the jury heard closing arguments on the legal claims and rendered its special verdict in favor of Hong on the claims for conversion and breach of fiduciary duty. It awarded Hong \$2,750,996 in damages, consisting of \$1,564,745 for the converted property, and \$1,186,251 for past profits.

II

DISCUSSION

Defendants argue the trial court erred in overruling their demurrer and denying their other dispositive motions. We address the various motions seriatim.

A. *Demurrer*

Defendants contend the trial court erred in overruling their demurrer to Hong's complaint. "[A]n order overruling a demurrer is not directly appealable but may be reviewed on an appeal from the final judgment." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913.) "The standard of review for an order overruling a demurrer is de novo. The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled." (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182-183.) "[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense." (*Id.* at p. 183)

Here, defendants demurred to the complaint on the ground that Hong was barred by the doctrine of res judicata from asserting her claims in the instant case. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 792 (*Boeken*) ["The doctrine of res judicata prohibits a second suit between the same parties on the same cause of action."].) On its face, the direct causes of action asserted in the complaint are based on Hong's rights as a purported member or owner of BEI and the derivative claims are based on defendants' alleged looting of BEI. Those claims have never been litigated and therefore Hong is not barred from asserting them by the doctrine of res judicata. Accordingly, the trial court properly overruled the demurrer.

B. *Motion for Summary Judgment*

Defendants contend the trial court erred in denying their motion for summary judgment with respect to all of Hong's claims. "A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any

triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review an order granting or denying summary judgment de novo. (*Id.* at p. 860.)

Here, defendants argued that as alleged in the complaint, *all* causes of action are predicated on Hong’s membership or ownership interest in BEI. We disagree. “An action to impose a constructive trust is a suit in equity to compel a person holding property wrongfully to transfer the property interest to the person to whom it rightfully belongs.” (*Higgins v. Higgins* (2017) 11 Cal.App.5th 648, 658 (*Higgins*).) “Three conditions must be shown to impose a constructive trust: (1) a specific, identifiable property interest, (2) the plaintiff’s right to the property interest, and (3) the defendant’s acquisition or detention of the property interest by some wrongful act.” (*Id.* at p. 659.) In Hong’s constructive trust claim, she alleged that “Defendants hold or will soon hold the property of [Hong] wrongfully taken and/or withheld, despite having no legal or equitable rights, claims or interest therein. Defendants are involuntary trustees holding said property therefrom in constructive trust for Plaintiff with the duty to convey the same to Plaintiff forthwith.” The allegations are sufficient to support a constructive trust claim, even if Hong is not a member or owner of BEI. Defendants therefore failed to satisfy their initial burden of production on the summary judgment motion, and the court properly denied it.

C. Motion for Judgment on the Pleadings

Defendants contend the trial court erred in denying their motion for judgment on the pleadings. “A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. [Citation.] A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review.’ [Citation.] ‘All properly pleaded,

material facts are deemed true, but not contentions, deductions, or conclusions of fact or law. ...’ [Citation.]” (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777.)

Here, defendants moved for judgment on the pleadings on the ground that Hong based all her claims on her alleged membership or interest in BEI, which she could not establish or previously had been adjudicated against her. However, Hong alleged that she has an ownership interest in BEI, and in considering a motion for judgment on the pleadings, “[a]ll properly pleaded, material facts are deemed true.” Hong’s admission she has never been a member of BEI, without more, does not contradict her ownership allegation. In addition, as the trial court properly found, Hong’s ownership interest in BEI, if any, had not been adjudicated in the earlier lawsuits. Finally, as stated above, Hong’s membership or ownership interest in BEI is not necessary for her constructive trust claim. The trial court did not err in denying defendants’ motion for judgment on the pleadings.

D. Motion in Limine

Defendants contend the trial court erred in denying their motion in limine to exclude evidence of “Hong’s purported ownership interest in Imperial Health Spa (‘Spa’) in Garden Grove,” arguing that the issue was previously litigated. To the extent the motion in limine is an evidentiary motion, the trial court did not abuse its discretion in denying the motion. Under Evidence Code section 351, “[e]xcept as otherwise provided by statute, all relevant evidence is admissible.” Here, Hong’s ownership interest in the spa is relevant to, among other things, her damages from BEI’s conversion of the spa. The mere fact that an issue previously has been litigated does not preclude its admission in a subsequent trial, absent a showing that its admission would be more prejudicial than probative. (Evid. Code, § 352.) Defendants did not make that showing.

To the extent defendants’ motion in limine sought to prevent Hong from litigating her prior ownership interest in the spa, we find no error in the trial court’s

denial of the motion. Hong never sought to litigate her prior ownership in the spa. Rather, she sought damages and an imposition of a constructive trust on BEI. Indeed, the parties *stipulated* that Hong was a 50 percent owner of the spa from 2004 through 2010.

Finally, to the extent the motion in limine allegedly sought to preclude Hong from litigating her claims because those claims were the same claims in the prior litigation, it seeks reconsideration of the trial court's prior rulings. However, we have concluded that the trial court did not err in denying defendants' various motions. Thus, the trial court did not err in denying defendants' motion in limine.

E. *Motion for Nonsuit*

As noted, Hong proceeded on four claims: equitable claims for (1) declaratory relief and (2) constructive trust, and legal claims for (3) breach of fiduciary duty and (4) conversion. After Hong's opening statement, defendants moved for nonsuit, arguing all of the claims at trial were materially different from the claims asserted in the complaint. (Code Civ. Proc., § 581c; see also *Bailey v. Brown* (1906) 4 Cal.App. 515, 517 [“[T]hat the plaintiff must recover, if at all, upon the cause of action alleged, and not upon some other which may appear from the proofs. [Citations.] Unless plaintiff obtained leave to so amend his complaint as to conform to the proofs, the defendant may have his nonsuit”].) Defendants also moved for nonsuit on the basis that the claims were barred by res judicata or the applicable statute of limitations.²

“‘A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference[,] which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor. [Citations.]’” (*Mechanical*

² As noted above, these two grounds were raised in defendants' answer to the complaint.

Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal.App.4th 672, 677.) “We review the ruling on a motion for nonsuit independently, employing the same standard that governs the trial court.” (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 876.) “Only the grounds specified by the moving party in support of its motion should be considered by the appellate court in reviewing a judgment of nonsuit.” (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.)

As explained further below, Lee is entitled to nonsuit on Hong’s claim for breach of fiduciary duty because that claim was previously litigated. Defendants are entitled to nonsuit on Hong’s claim for conversion because it is time-barred under the applicable statute of limitations. For the same reasons, defendants are entitled to nonsuit on the derivative constructive trust and declaratory relief claims.

1. Res judicata

“Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of action.” (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589 (*Amin*).) “[R]es judicata bars relitigation of the same cause of action by the same parties and . . . the definition of a cause of action for this purpose depends, not on the legal theory or label used, but on the primary right sought to be protected in the two actions.” (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1517, fn. 17.) Whether causes of action in two lawsuits are the same for purposes of res judicata depends on whether they involve the same “primary right.” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681 (*Crowley*); see *Boeken, supra*, 48 Cal.4th at p. 797 [“To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have ‘consistently applied the “primary rights” theory”].)

“[T]he primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of

the primary right.” (*Amin, supra*, 112 Cal.App.4th at p. 589.) Under this theory, “the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right.” (*Boeken, supra*, 48 Cal.4th at p. 798.) Thus, a “cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.” (*Ibid.*) A party may rely on several legal theories to allege liability based on a violation of a single primary right and seek different remedies for the violation. (*Crowley, supra*, 8 Cal.4th at p. 681-682.) Regardless, “[t]he most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.” (*Id.* at p. 681.) “Even when several defendants cause a single injury to plaintiff, ‘[t]he primary right is determinative. So, if there is only one primary right violated there is only one cause of action, even though there may be two or more wrongdoers, each doing a wrongful act and each individually liable for it.’ [Citation.]” (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 575 (*Higashi*).)

In prior litigation, Hong asserted a breach of fiduciary duty claim against Lee for converting her 50 percent interest in the spa in violation of a 2004 joint venture agreement. She lost on that claim. In the instant matter, Hong asserted a breach of fiduciary claim against Lee for forming BEI to convert the spa in violation of a 2004 “written partnership agreement.” The breach of fiduciary duty claim in the prior action and the instant action involve the same primary right: Hong’s right not to be deprived of her 50 percent interest in the spa by a business associate. Hong suffered the same harm whether Lee directly converted the spa or formed BEI to do so in violation of a fiduciary duty. Thus, the judgment in the prior action bars Hong from litigating the breach of fiduciary duty claim in this action.

Likewise, to the extent the conversion claims asserted against Lee and Eun Joo in this case are based on individual misconduct – as opposed to acts performed on

behalf of BEI – those claims also are barred by the doctrine of res judicata. In the prior litigation, Hong asserted and lost a conversion claim she prosecuted against Lee and Eun Joo for their conversion of her 50 percent interest in the spa. Here, Hong alleged that Lee and Eun Joo formed BEI to convert her interest in the same spa. The two causes of action are based on the same primary right: Hong’s ownership interest in the spa. She suffered the same harm regardless how Lee and Eun Joo converted the spa. (See *Higashi, supra*, 131 Cal.App.4th at p. 575 [“‘if there is only one primary right violated there is only one cause of action, even though there may be two or more wrongdoers, each doing a wrongful act and each individually liable for it.’ [Citation]”]; see also *de Vries v. Brumback* (1960) 53 Cal.2d 643, 647 [conversion is “a continuing tort [lasting] as long as the person entitled to the use and possession of his property is deprived thereof.”].) Thus, Hong is precluded from litigating the conversion claim against Lee and Eun Joo in the instant lawsuit.

Finally, to the extent the constructive trust and declaratory relief claims here are derivative of the individual breach of fiduciary duty and conversion claims, Hong is also barred from litigating those claims for the same reasons stated above.³

2. Statute of Limitations

“Where a defendant has pleaded the bar of the statute of limitations, a motion for nonsuit should be granted if the plaintiff’s evidence shows that his [or her] action is barred.” (*Haley v. Santa Fe Land Improvement Co.* (1935) 5 Cal.App.2d 415, 425.) Conversion has a three-year limitations period. (Code Civ. Proc., § 338, subd. (c); *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 915.) “[S]tatutes of limitation do not begin to run until a cause of action accrues.” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).) “Generally speaking, a cause of action

³ Our ruling has no preclusive effect on the constructive trust and declaratory relief claims asserted in the prior action and presently stayed because those claims are based on misconduct predating the formation of BEI.

accrues at ‘the time when the cause of action is complete with all of its elements.’” (*Ibid.*, quoting *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) The limitations period on a conversion claim begins to run upon the act of wrongfully taking property. (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639.)

Here, BEI allegedly converted Hong’s 50 percent interest in the spa on April 14, 2011. The three-year limitations period began to run on that date. Hong filed her complaint on September 18, 2014, which is more than three years later. Thus, Hong’s conversion claim against BEI is time-barred unless an exception applies to save the claim.

“An important exception to the general rule of accrual is the ‘discovery rule,’ which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” (*Fox, supra*, 35 Cal.4th at p. 807.) “In order to rely on the discovery rule for delayed accrual of a cause of action, ‘[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.’ [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to ‘show diligence’; ‘conclusory allegations will not withstand demurrer.’ [Citation.]” (*Fox, supra*, 35 Cal.4th at p. 808.)

Here, the trial court found that Hong did not discover BEI’s conversion of her interest in the spa until October 14, 2011. The court did not cite any evidence to support its finding. Although Hong testified she was not aware of BEI’s formation in April 2011 or that the spa’s lease had been assigned to BEI on April 14, 2011, she was not asked and did not testify about when and how she discovered BEI’s conversion of her interest in the spa. The unverified complaint alleged that Hong did not discover the conversion until October 14, 2011, but defendants denied the allegations in their answer. More important, “allegations in a complaint do not, at trial, constitute evidence of the

truth of the allegations made therein.” (*Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 241.)

In supplemental briefing,⁴ Hong notes that in the cross-complaint she filed against Lee, Joung Hee, and Howard’s other siblings (see *supra* part I.A), she alleged that she did not discover that the Imperial health spa had been evicted until October 14, 2011, when Lee and Joung Hee filed an opposition to Hong’s request for a preliminary injunction. Again, allegations in a complaint are not evidence. That the opposition might have put Hong on notice of a conversion claim does not establish that she could not and did not discover the existence of the claim on an earlier date. Likewise, that Hong received notice from the California Secretary of State about being appointed as BEI’s CEO and agent of process in December 29, 2011, does not, by itself, establish she did not discover the conversion claim on an earlier date. In sum, no substantial evidence supports the trial court’s finding that Hong discovered BEI’s conversion on October 14, 2011. Because Hong filed her complaint on September 18, 2014, she had the burden to prove she first discovered the conversion claim within three years of that date, i.e., any time after September 18, 2011. (See *Fox, supra*, 35 Cal.4th at p. 808 [plaintiff has burden to show entitlement to delayed discovery rule].) Hong failed to do so. Thus, she is not entitled to delayed accrual of her claim under the discovery rule.

The doctrine of equitable tolling does not assist Hong. “The ‘equitable tolling’ doctrine is a judicially created doctrine designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations –timely notice to the defendant of the plaintiff’s claims – has been satisfied.” (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38, 40 [applying doctrine because “the action here before us ‘is in reality a continuance of the

⁴ After oral argument in this case, we vacated submission of the matter and requested the parties file supplemental briefing on several issues, including evidence to support the date Hong discovered the conversion claim.

earlier action.’ [Citation.]”). The claim against BEI for conversion of Hong’s interest in the spa in April 2011 was asserted for the first time in the instant action. Thus, BEI had no prior notice of the claim. Accordingly, the doctrine of equitable tolling is inapplicable. (See *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1086 [no basis for equitable tolling where plaintiff’s claim concerns different wrongs].)

Finally, the doctrine of equitable estoppel does not apply to save Hong’s claims. “An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. [Citation.] To create an equitable estoppel, “it is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.”” (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153.) ““Equitable estoppel, however, . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice.”” (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.) Hong contends she is entitled to equitable estoppel because Lee and Eun Joo fraudulently concealed from her the formation of BEI and the assignment of the spa’s lease to BEI. The evidence, however, showed that the defendants’ fraudulent concealment solely consists of their failure to disclose facts. “Absent a fiduciary relationship, nondisclosure is not fraudulent concealment—affirmative deceptive conduct is required.” (*Long v. Walt Disney Co.* (2004) 116 Cal.App.4th 868, 874.) Because Hong was never a member or part owner of BEI, defendants did not owe her any

fiduciary duty to disclose the conversion. In sum, Hong has not established that she is entitled to relief under the doctrine of equitable estoppel.⁵

To the extent that the equitable claims for constructive trust and declaratory relief are based on conversion, the claims have a three-year limitations period and begin running from April 14, 2011. (See *Higgins, supra*, 11 Cal.App.5th at p. 659 [“An action to impose a constructive trust is subject to the statute of limitations that governs the underlying substantive right.”]; *Martin v. Kehl* (1983) 145 Cal.App.3d 228, 240 [limitations period “begins to run upon the right to enforce a constructive trust from the time the [plaintiff] has notice or should know of the *wrongful* holding of the property.”]; *Snyder v. California Ins. Guarantee Assn.* (2014) 229 Cal.App.4th 1196, 1208 [“The duration of the limitations period applicable to a declaratory relief action is determined by the nature of the underlying obligation sought to be adjudicated.”]; *Maguire v. Hibernia Savings & Loan Society* (1944) 23 Cal.2d 719, 734 [for declaratory relief action, limitations period begins to run from the moment claim accrues].) For the same reasons stated above, the claims are time-barred and Hong has not shown that an exception applies. Accordingly, defendants are entitled to nonsuit on Hong’s conversion claim and the derivative constructive trust and declaratory relief claims, and the judgments on those claims must be reversed.

⁵ Because Lee independently owes fiduciary duties to Hong as a partner in the Imperial Health Spa, he could be estopped from asserting a statute of limitations defense against Hong on her claims against him. However, as discussed earlier, the individual claims against Lee were previously adjudicated, and the doctrine of *res judicata* bars Hong from relitigating the claims.

III

DISPOSITION

The judgments are reversed. Defendants are entitled to their costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.